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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554 /

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The facts and circumstances surrounding this matter are clear, unequivocal and uncontroverted. In Wilburn's application, the principals of the applicant certified that Wilburn intended to utilize the site, tower and equipment owned by Mid-Ohio Communications, Inc. ("Mid-Ohio"), the former licensee of Station WBBY-FM, Westerville, Ohio. Prior to such certification, they obtained a letter from Carl B. Fry, Mid-Ohio's authorized representative, dated December 27, 1991, which: referenced Charles Wilburn's inquiry as to whether the site and facilities were available for lease; confirmed that the real property and personal property were in fact available; stated that Mid-Ohio is willing to negotiate an appropriate lease; identified the property which would be leased; and specified the monthly rental payment which would be charged for the use of such property.¹ The letter also stated that the rent would not be reduced if Wilburn chose to use only some of Mid-Ohio's equipment, and required Wilburn to demonstrate its financial qualifications within the following sixty days. Mid-Ohio advised Wilburn, as well, that it reserved the right to again review Wilburn's financial condition at the time a lease is negotiated and that it would require Wilburn's principals to personally and unconditionally guarantee Wilburn's obligations under the lease. Finally, Mid-Ohio stated that its letter did not constitute a binding commitment on its part and that, although it contemplated

¹ A copy of Mid-Ohio's letter is attached hereto as Attachment A.

that mutually acceptable terms will be negotiated at the time Wilburn obtains a construction permit, it could not guarantee that occurrence. Wilburn then provided the financial information required by Mid-Ohio under cover of a letter to Mid-Ohio dated February 6, 1992.²

Thus, Wilburn and Mid-Ohio clearly reached a "meeting of the minds" and had a firm understanding that the site in question would be available for lease. The property to be leased was precisely defined, the monthly rent was specified, and other critical matters, such as the applicant's financial position and the requirement that its principals personally guarantee the applicant's obligation under the contemplated lease, were expressly addressed. Wilburn also has satisfied the sole condition imposed by the owner at this time. In these circumstances, there can be no good faith doubt that Wilburn obtained "reasonable assurance" that its proposed site will be available to it. See, Genesee Communications, Inc., 3 FCC Rcd 3595 (Rev.Bd. 1988); Radio Delaware, Inc., 4 FCC Rcd 8630 (Rev.Bd. 1989); Adlai E. Stevenson 5 FCC Rcd 1588 (Rev.Bd. 1990); National Communications Industries, 6 FCC Rcd 1978 (Rev.Bd. 1991); Rem Malloy Broadcasting, 6 FCC Rcd 5843 (Rev.Bd. 1991).

In view of the foregoing, there is absolutely no factual or legal basis for the qualifying issue sought by ORA. Plainly, the owner of the site has done far more than merely express a general

² A copy of Wilburn's letter is attached hereto as Attachment B.

"willingness to deal" or indicate that he will "discuss the possibility of lease at some future date", as alleged by ORA. Moreover, contrary to ORA's claim that the terms of the proposed lease have not been negotiated, the basic and most critical elements of the lease were expressly set forth in Mid-Ohio's letter and, where a condition was established, such condition was satisfied by Wilburn.³

The precedent cited by ORA also fails to support its Motion.

available, so that negotiating a lease with those owners never was a more than a mere possibility. Similarly, in contrast to the facts of the instant proceeding, where Mid-Ohio provided specific terms and conditions to Wilburn and Wilburn then satisfied the sole pre-grant condition, the applicants in Dutchess Communications Corp., 101 FCC 2d 243 (Rev.Bd. 1985); Cuban-American Limited, 2 FCC Rcd 3264 (Rev.Bd. 1987); and Lee Optical and Associated Cos., 2 FCC Rcd 5480 (Rev.Bd. 1987), ignored the conditions set by the property owner. They also either failed to contact the landowner or disregarded the owner's statement that his land was unavailable for the applicant's purpose.⁴

In sum, ORA's Second Motion is entirely without merit. The facts of this case and applicable Commission precedent establish that Wilburn has obtained the requisite reasonable assurance that the site specified in its application will be available to it.

Judge when such document was provided to it in response to its own discovery efforts.

Accordingly, ORA's Second Motion to Enlarge Issues Against Wilburn should be denied.

Respectfully submitted,

WILBURN INDUSTRIES, INC.

By:


Eric S. Kravetz

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1920 N Street, N.W., Suite 660
Washington, D.C. 20036
(202) 887-0600

June 9, 1993

Its Attorneys

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MID-OHIO COMMUNICATIONS, INC.
Post Office Box 14
Westerville, Ohio 43081

ATTACHMENT A

December 24, 1991

Charles W. Wilburn
Attorney at Law
210 S. Court Street
Circleville, OH 431131

RE: Mid-Ohio Communications, Inc./WBBY-FM/Lease of Assets

Dear Mr. Wilburn:

This correspondence is in regard to your recent inquiry pertaining to the lease of certain real property and personal property owned by Mid-Ohio Communications, Inc. or affiliated companies which is utilized in regard to the broadcast operation of WBBY-FM. You have indicated that you are planning to apply for the broadcast license of WBBY-FM, Westerville, Ohio, and this correspondence is to confirm that should the Federal Communications Commission award you the construction permit, Mid-Ohio Communications, Inc., the former licensee of WBBY-FM, is willing to negotiate appropriate leases with you for certain real property and personal property owned by Mid-Ohio Communications, Inc. or affiliated companies in the amount of Six Thousand Dollars (\$6,000.00) per month.

The real estate lease and equipment lease which would commence upon the FCC granting your construction permit would include the use of the tower site (tower and building) located at State Route 37, Sunbury, Ohio 43074; studio facilities located at 14 Dorchester Court, Westerville, Ohio 43081; and equipment utilized in the operation of the station. The equipment would include some or perhaps all of the equipment itemized in the inventory accompanying this correspondence. Failure to lease all of the equipment listed in the inventory will not result in a reduced lease package price. This correspondence conveys an intent to negotiate terms of lease agreements and does not in and of itself constitute lease agreements. Although it is contemplated that mutually acceptable terms will be negotiated in regard to the various leases, there is no guarantee of that occurrence.

Within sixty (60) days of the date of this letter, you must provide Mid-Ohio Communications, Inc. with a showing of financial qualifications satisfactory to Mid-Ohio Communications, Inc. for it to enter into the above-referenced leases. Mid-Ohio Communications, Inc. reserves the right to cancel this letter within sixty (60) days of receipt of your financial information. Notwithstanding the above, at the time you receive the construction permit, Mid-Ohio Communications, Inc. reserves the right to again review your financial condition to determine if you then have financial qualifications satisfactory to Mid-Ohio Communications, Inc. to enter into the above-referenced leases. In regard to a showing of financial strength, if the lessee is a corporation, the principals of lessee will have to personally sign unconditional

WELDON & WILBURN

ATTORNEYS AT LAW

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CHARLES W. WILBURN

BERNARD P. WILBURN

LEMUEL B. WELDON

(1903-1981)

February 6, 1992

Carl B. Fry
Attorney at Law
35 East Livingston Avenue
Columbus, Ohio 43215

HAND DELIVERED 2/6/92

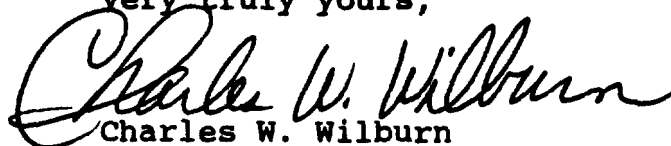
Re: Mid-Ohio Communications, Inc./WBBY-FM/Lease of Assets
Applicant, Wilburn Industries, Inc.

Dear Mr. Fry:

In accordance with your letter to the undersigned dated December 24, 1991, enclosed are statements of financial position for Charles W. Wilburn and Bernard P. Wilburn. Charles and Bernard Wilburn are the principals of Wilburn Industries, Inc., applicant for the WBBY license.

Please confirm whether our financial qualifications are satisfactory to Mid-Ohio Communications, Inc. for it to enter into leases pursuant to your letter dated December 24, 1991 within 60 days of this date.

Very truly yours,


Charles W. Wilburn

Enclosures

CERTIFICATE OF SERVICE

I, JacLyn Freeman, a secretary in the law firm of Brown, Nietert & Kaufman, Chartered, do hereby certify that on this 9th day of June, 1993, caused to be mailed U.S. mail, postage prepaid, a copy of the foregoing "Opposition to Second Motion to